Court File No. C42923

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

D.B.
(A Young Person)

[Publication Ban in Effect Pursuant to s.110 of the *YCJA*]

Respondent

FACTUM OF THE INTERVENER THE CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW

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PART I
STATEMENT AS TO FACTS

1. The Foundation is a provincially incorporated charitable organization constituted for the purpose of promoting the rights of children and youth and their recognition as vulnerable individuals under the law.

2. The Foundation has considerable expertise in legal representation, advocacy, and policy and community development on behalf of children and youth in the youth justice and legal aid systems and more particularly with respect to the *Youth Criminal Justice Act,* S.C. 2002, c.1 ("*YCJA*") and its implementation. The Foundation has consulted directly with the federal government on issues

relating to the *YCJA* and the *Young Offenders Act* ("*YOA*"). The Foundation brings a youth rights focus to this appeal.

3. The Foundation will address constitutional issues with respect to the presumptive offences under the *YCJA* and the onus placed upon the accused young person in regard to adult sentencing and the publication of his identity. The Foundation relies upon the facts as presented by the Appellant and Respondent and where the facts are in dispute, the Foundation takes no position.

PART II
ISSUES AND LAW

Overview of the Intervener's Position

4. The *YCJA* creates a statutory presumption that a young person over the age of 14 years, who commits certain offences ("presumptive" offences), shall receive an adult sentence unless the young person demonstrates that a youth sentence should be imposed. The Foundation contends that the presumption contravenes s.7 of the *Charter* and is not saved by s.1. The Foundation further contends that the legal onus should not be on a young person to seek a ban on publication of identifying information when he has been given a youth sentence for a "presumptive" offence, and that this provision also contravenes s. 7 and is not saved by s.1. In regard to both issues, the

learned trial judge did not err in relying on the unanimous decision of a five member panel of the Quebec Court of Appeal, which held those provisions of the *YCJA* to be unconstitutional to the extent of the reverse onus. The Foundation disagrees with the Appellant's contention that subsequent jurisprudence alters the conclusion reached by the learned trial judge in respect of the principles of fundamental justice.

5. The Foundation proposes to approach the issues by first addressing the context for the interpretation of the *Charter* rights in question as they pertain to the relevant provisions of the *YCJA*. Three aspects of the context will be addressed: the international law with which Canada is presumed to be in compliance; the historical and developmental basis for a separate regime for young people in conflict with the law; and the purpose of the *YCJA*, as expressed in the preamble and declaration of principles. All of these factors militate toward the approach to the constitutional issues taken by the Quebec Court of Appeal and the learned trial judge below.

Impact of the International Law

6. Despite the Quebec Court of Appeal's opinion that the *YCJA* was not incompatible with international law,[1] international law maintains its relevance to support that Court's conclusions as to the principles of fundamental justice

[1] *Reference re: Bill C-7 respecting the criminal justice system for young persons*, [2003] Q.J. No. 2850, (C.A.); 175 C.C.C (3d) 321 (Que. C.A.)

and in respect of the s.1 analysis. The Foundation contends that the requirement of a distinct system of juvenile justice for children is an important principle of international law, which is reflected in the *Charter* as a principle of fundamental justice in s.7, within the youth criminal justice context.

7. The principles of constitutional and statutory interpretation require that, whenever possible, the *Charter* should be interpreted in a manner consistent with international law, and specifically, with Canada's international human rights obligations.[2] The development of international human rights "was an important influence leading to an entrenched guarantee of rights and freedoms in this country."[3] Accordingly, the values and principles reflected in international human rights law inform the context in which the *Charter* was enacted and in which its provisions must be read.[4]

8. The Supreme Court has held that Canadian law must be interpreted to comply with Canada's international treaty obligations.[5] Once Canada has internationally obligated itself to ensure the protection of certain fundamental freedoms within its borders, it should generally be presumed that the Charter provides "protection as least as great as that afforded by similar provisions in

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[2] R. Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed., (Toronto: Carswell, 1994) at p. 330. See also, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 817 at para. 70-71
[3] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at p. 193-194, para. 57
[4] *Baker, supra* note 2 at pp. 861-862, para. 70
[5] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 32

those international human rights documents which Canada has ratified."[6] We look to international law as evidence of the principles of fundamental justice.[7]

9. The most significant international convention regarding the rights of children is the United Nations *Convention on the Rights of the Child* (the "*UNCRC*"). The *UNCRC* is the most widely ratified and accepted human rights treaty of all time.[8] Arbour J., in her dissenting opinion, stated that "Canada's international obligations with respect to the rights of the child must also inform the degree of protection that children are entitled to under s.7 of the *Charter*."[9] Furthermore, the Supreme Court of Canada has increasingly recognized the *UNCRC* in other contexts where children's rights are affected.[10]

10. Significantly, the Preamble of the *YCJA* specifically acknowledges that Canada is a party to the *UNCRC*. The Quebec Court of Appeal held that the reference to the *UNCRC* in the preamble to the *YCJA* means there is "relative interdependence" between the two.[11] That interdependence is significant when read in the conjunction with the principles of the legislation, other international obligations and the nature of the right at stake.

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[6] *Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at p. 350; see also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at p. 1056
[7] *Suresh v.Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 60
[8] Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (current to September 16, 2005)
[9] *Canadian Foundation*, *supra* note 5 at para. 186
[10] *Baker, supra* note 2 at para. 69; *R. v. Sharpe,* [2001] 1 S.C.R. 45 at para. 19; *Winnipeg Child and Family Services v. K.L.W.,* [2000] 2 S.C.R. 519 at para. 7
[11] *Reference re: Bill C-7, supra* note 1at para. 92

International Law and the Principles of Fundamental Justice

11. The learned trial judge adopted the Quebec Court of Appeal's reasoning in respect of the substantive, as well as the procedural, principles of fundamental justice. The Quebec Court of Appeal correctly looked to the Canadian domestic law. However, international law is also relevant and supportive of the following four substantive principles enunciated by that Court:

    1. Young offenders must be dealt with separately from adults.
    2. Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons.
    3. The justice system for minors must limit the disclosure of the minor's identity so as to prevent stigmatization that can limit rehabilitation.
    4. It is imperative that the justice system for minors consider the best interests of the child.[12]

12. As signatory to and proponent of the *UNCRC*, Canada has undertaken to provide special protective treatment to children, based on their vulnerability. The Preamble to the *UNCRC* states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration**." *This is the only consideration that is characterized as primary*.**

[12] *Ibid* at paras. 215 and 231

13. Article 40 of the UNCRC requires State Parties to treat children who have infringed the penal law in a manner consistent with the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society, in respect of dispositions or sentencing. In other words, rehabilitation is at the "heart of the legislative and judicial intervention with young persons."[13]

14. Canada is also a signatory to the United Nations *International Covenant on Civil and Political Rights* (the "*ICCPR*"). Article 10 of the *ICCPR* requires juvenile offenders to be accorded treatment appropriate to their age and Article 14 requires that procedures take into account their age and the desirability of promoting their rehabilitation.

15. These principles are repeated in many other international instruments pertaining to youth justice. Rules and guidelines adopted by the United Nations General Assembly state that the best interests of a young person should be of paramount importance,[14]that juveniles (defined as every person under the age of 18) should be detained separately from adults,[15]and most comprehensively, that nations develop a juvenile justice system that emphasizes the well-being of the juvenile and that conducts proceedings in a

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[13] *Ibid* at para. 215
[14] *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)*, adopted and proclaimed 14 December, 1990, art. 46.
[15] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted 14 December 1990, arts. 11(a) and 29,

manner “conducive to the best interests of the juvenile” and in “an atmosphere of understanding”.[16]

16. The youth justice principles of non-disclosure and rehabilitation are inextricably linked in the international law as they are in Canadian domestic law. The *UNCRC* requires Canada to guarantee the child’s right to have his or her privacy fully respected at all stages of the proceedings.[17] *The Beijing Rules* link this right to the harm caused by publicity and the process of labeling, and further states that “no information that may lead to the identification of a juvenile offender shall be published.”[18]

17. Most importantly, Canada’s international obligations to children who have committed offences, support a *presumption* that juvenile offenders are not to be treated like adults. A presumption of an adult sentence, regardless of parole eligibility, is anathema to this fundamental principle of international juvenile justice. Similarly, a *presumption* of public disclosure of a young person’s identifying information, despite the imposition of a youth sentence, is not consistent with the international obligation to protect the privacy and promote the rehabilitation of the young person.

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[16] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),* adopted 29 November 1985, arts. 1.4 and 14.2.
[17] *UNCRC*, art. 40
[18] *The Beijing Rules, supra* note 16, Rules 8.1 and 8.2

Separate Youth Justice System

18. Although the Quebec Court of Appeal's analysis of the principles of fundamental justice pre-dated the test recently enunciated by the Supreme Court,[19] the four principles adopted by the Quebec Court in relation to the youth justice system meet the three criteria set out by the Supreme Court:

    1. It must be a legal principle; and
    2. There must be sufficient consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate ("fundamental to our societal notion of justice"); and
    3. It must be identified with sufficient precision to yield manageable standard against which to measure deprivations of life, liberty or security of the person ("yields predictable results").

19. The Appellant only acknowledges that young persons are entitled to recognition of their reduced maturity as a principle of fundamental justice. The Foundation asserts that this does not go far enough in respect of the youth justice system and, in fact, lacks the precision required. The principle is more accurately and precisely stated by the Quebec Court of Appeal as being a separation in the criminal justice system between young people and adults. The Foundation will clearly illustrate how this more precise principle meets the established criteria.

<u>It must be a legal principle</u>

20. The principle that young people are to be treated separately from adults has been long established as part of Canadian law. Further, the international law

[19] *Canadian Foundation, supra* note 5 at para. 8; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 113

is consistent with the general approach taken in Canada toward youth criminal justice. The *YCJA* is the culmination of various pieces of legislation dealing with youth criminal justice. Young people were first treated differently in 1894 when those under age 16 years were subject to separate trials. [20] Since the enactment of the *Juvenile Delinquents Act* in 1908, Parliament has made a definitive choice to treat youth differently from adults in a more comprehensive youth justice regime.[21] With the enactment of the *Young Offenders Act* in 1985, and consistent with the *UNCRC*, young people include all minors under 18.

21. This principle is well established in the Preamble to the *YCJA*, which emphasizes society's "responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood." The Preamble also emphasizes that the Act as a whole is a contextual approach to youth justice. In particular, it seeks to address the underlying causes of youth crime, respond to the needs of youth, and provide support to youth at risk for offending.

22. The youth criminal justice system is aimed at establishing a separate and distinct approach to crimes committed by young people. This approach extends to the level of culpability attributed to young people for crimes they

[20] *R. v. M.(S.H.)[S.M.H.]*, [1989] 2 S.C.R. 446, per L'Heureux-Dubé, J, in dissent at paras. 48-51
[21] Bala, Nicholas, *Youth Criminal Justice Law* (Toronto: Irwin Law Inc., 2003) at p.7

have committed.[22] In *Reference re Young Offenders Act (PEI)*, the Supreme Court stated that:

> … jurisdiction over young persons charged with a criminal offence acknowledges that what distinguishes this legislation from the Criminal Code is the fact that it creates a special regime for young persons. The essence of the young offenders legislation is a distinction based on age and on the ***diminished responsibility associated with this distinction***.[23] [emphasis added]

There must be consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate

23. Both Canadian legislation and common law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. Accordingly, when judging the degree to which young people are held responsible for their actions, age and developmental stage have always been determining factors. In *R. v. Hill*, this Court recognized the differences in accountability between adults and youth. Dickson C.J. stated that:

> I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person. For a jury to assess what an ordinary person would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.[24]

24. The Preamble of the *YCJA* recognizes that young people have special developmental characteristics and challenges that must be addressed in this

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[22] *R. v. M.(J.J.)*, [1993] 2 S.C.R. 421, at para. 13-17
[23] *Reference re Young Offenders Act (PEI)*, [1991] 1 S.C.R. 252, at para. 23
[24] *R. v. Hill*, [1986] 1 S.C.R. 313, at p. 332

intentionally unique regime. According to the Department of Justice Canada the *YCJA* ensures that:

- *Young people are tried in youth court separate from adults,* ***where all the protections suitable to their age are in place. [***emphasis added][25]

- *The principles of the YCJA provide clear direction, establish structure for the application of principles and thereby resolve inconsistencies.* ***These principles reinforce that the criminal justice system for youth is different than the one for adults.*** *[emphasis added]*[26]

25. While Canadian courts have long acknowledged that young people have special protections under the law, the evidentiary basis for mitigating the consequences for youth crime has most recently been canvassed by the U.S. Supreme Court. In *Roper v. Simmons*, a murder sentencing case, the U.S. Supreme Court specifically recognized that young people are more likely to act out of impulse since their ability to judge risk and the consequences of their behaviour is less developed than adults. The Court stated as follows:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, … [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. … The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure… this is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their environment. … The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.[27]

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[25] Department of Justice Canada: "Youth Justice Renewal: "Youth Justice Fact Sheet" [http://canadajustice.gc.ca/en/ps/yj/aboutus/yje.html] accessed 16 September 2005

[26] Department of Justice Canada: "Why did the Government Introduce New Youth Justice Legislation?" [http://canadajustice.gc.ca/en/ps/yj/ycja/why.html] accessed 16 September 2005

[27] *Roper v. Simmons,* 543 U.S. 1 (2005), (U.S. Supreme Court), at pp. 15-16

26. The majority of the U.S. Supreme Court relied upon the recent research in developmental psychology focused on adolescents which speaks to the acceptance of the approach as being the way in which the legal system ought fairly to operate.[28] The evidence adopted by the Court, which is consistent with established law and expert commentary in Canada, confirms that adolescents approach risky behaviour in a substantially different way than adults, both in their perception of the risks involved in a particular activity as well as their susceptibility to group or peer influences.[29]

27. Canadian laws recognize that adolescence is a period during which decision-making capacity evolves and matures. Experts note that young people are generally capable of understanding what is morally wrong. Correspondingly, the youth justice system confers moral responsibility for crime at age 12 while mitigating the consequences in accordance with our understanding of the developmental realities of adolescence. The rationale behind the system has been summarized as follows:

> There are two broad reasons for separate youth justice policies: 'diminished responsibility due to immaturity and special efforts designed to give young offenders room to reform in the course of adolescent years' (Zimring, 2000). …
> [diminished responsibility] is ***not merely a doctrine of juvenile justice but a principle of penal proportionality***. [emphasis added][30]

28. The international law supports the principle that children need special protections within the youth justice system. The *YCJA* is premised on this as

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[28] *Ibid*, at pp. 15-16

[29] Laurence Steinberg and Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty", (2003) 58 *American Psychologist*, No. 12, p.4

[30] Anthony N. Doob and Carla Cesaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004), at 30, 31

a fundamental requirement. But in addition, the empirical evidence suggests that these supports for young people are an essential component of a fair justice system. Doob states,

> Looking at this research as a whole, it is clear that we cannot assume that young people have sufficient knowledge of the legal system and the criminal law provisions that govern proceedings in the youth justice system to fully and freely participate in criminal proceedings against them.[31]

It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person

29. The *YCJA* contains both a Preamble and a Declaration of Principle to clarify the principles and objectives of the youth justice system. The Preamble contains significant statements from Parliament about the values governing the legislation. These statements guide the interpretation of the legislation and include the following:

    - Enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their ***right to privacy*****,** are protected. (emphasis added)
    - Society has a responsibility to address the developmental challenges and needs of young persons.
    - Young persons have rights and freedoms, including those set out in the United Nations *Convention on the Rights of the Child.*
    - The youth justice system should reserve its most serious interventions for the most serious crimes and reduce the over-reliance on incarceration.

30. The principle that young people under the age of 18 years who offend the law are to be treated separately from adults in the criminal justice system is a

[31] *Ibid* at pp. 39-40

clear and manageable standard, especially as the Foundation submits that Canada has a long legislative history that provides special protections to young people in accordance with their needs. Phrased another way, the principle is that young people are presumed not to be treated the same as adults. The issue in this case is not whether a young person can ever receive an adult sentence, but simply who should bear the onus of proving that an adult sentence is appropriate or not. Placing the burden on the young person offends the principle of fundamental justice that the presumption be the treatment of the young person separate from the adult system, including adult sentences. It is simply inconsistent with the stated intent of the legislation to treat young people the same as adults in the criminal justice system.

Application of the Test to the Principle of the Best Interests of the Child

31. The Foundation relies upon the argument advanced by the Respondent that the *Canadian Foundation* case is distinguishable due to the context in which this principle is advanced (i.e. as a protective shield in a youth-oriented system rather than a sword in the adult criminal context).

Application of the Test to the Principle of Rehabilitation

32. The role of rehabilitation is an equally well-established principle in the sentencing of young persons, since the enactment in 1908 of the *Juvenile Delinquents Act*. As one commentator stated, “Under the *Juvenile*

Delinquents Act, rehabilitation was the engine that drove sentencing decisions."[32]

33. In 1993, the Supreme Court reaffirmed the rehabilitative goal of youth sentencing in *R. v. M.(J.J.)*,[33] where the court held that the ultimate aim of all youth sentences must be the reform and rehabilitation of the young people sentenced. In *R. v. Southam,* the Ontario Court of Appeal affirmed the statement of the lower court that "*the protection and rehabilitation of young people involved in the criminal system is a social value of super ordinate importance*".[34] Rehabilitation depends significantly on timeliness and the end of stigma.

34. The *YCJA* continues and strengthens this approach to youth sentencing. Both the Declaration of Principle (section 3) and Purpose and Principles of sentencing (section 38) of the *YCJA* require the imposition of just sanctions that have meaningful consequences for a young person found guilty of an offence and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. Contrary to the Appellant's assertion that this goal competes with others under the

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[32] Anand, Sanjeev, "Crafting youth sentences: the roles of rehabilitation, proportionality, restraint, restorative justice, and race under the *Youth Criminal Justice Act*" (2003) Alta. L. Rev., vol 40(4) 943 at p. 946

[33] *M.(J.J.) supra* note 22

[34] *R. v. Southam Inc.* (1984), 48 O.R. (2d) 678, (Ct. Just.), at QL p. 11, affirmed 53 O.R. (2d) 663 (C.A.), leave to appeal to S.C.C. refused (1986), 25 C.C.C. (3d) 119

YCJA, the goal of rehabilitation is consistent with and in fact requisite for the goal of public safety.

Application of the Test to the Principle of Confidentiality

35. In interpreting the *YCJA*, the Quebec Court of Appeal affirmed that the law protecting the privacy and identity of a young person is "*the cornerstone of the Canadian youth justice system."* [35] That Court went on to state that this principle is reflected in the specific protection of a young person's privacy in s.3(1)(b)(iii) of the *YCJA* "*in terms of additional procedural measures to provide for fair treatment in protecting their rights, particularly to privacy.*" The protection of privacy enhances the young person's chances of being rehabilitated, which is beneficial not only to the young person, but also to society as a whole. It is in the public interest to have young people move on without record or public knowledge of their misconduct.

36. As the Supreme Court has held "*the essence of privacy, however, is that once invaded, it can seldom be regained."* [36] Any record or personal information retained, increases the risk that the information may inadvertently or incorrectly be disclosed. This can have a greater impact on young people, because of their greater dependency and their vulnerability.

37. The Supreme Court speaking to the need for confidentiality stated,

> Stigmatization of premature "labelling" of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society is best protected by preventing recurrence. Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for 'young offenders'"(p.883).[37]

38. The developmental research confirms that adolescence is a period in which personal identity is being formed. As the majority of the Court in *Roper v. Simmons* held, "[t]he personality traits of juveniles are more transitory, less fixed."[38] The impact of labelling and custodial sentences at this time in a young person's development can be counter to the aims of rehabilitation. Doob notes the increased recidivism of young people who are exposed to the system and to short periods of custody by way of a "short sharp shock".[39] Steinberg describes this critical time as follows:

> The emergence of personal identity is an important developmental task of adolescence and one in which the aspects of psychosocial development discussed earlier play a key role. As documented in many empirical tests of Erickson's (1968) theory of adolescent *identity crisis,* the process of identity formation includes considerable exploration and experimentation over the course of adolescence…. Although the identity crisis may occur in middle adolescence, the resolution of this crisis, with the coherent integration of the various retained elements of identity into a developed *self*, does not occur until late adolescence or early adulthood… Often this experimentation involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior. For most teens, these behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who

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[35] *Reference re: Bill C-7, supra* note 1at para. 276
[36] *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 119
[37] *Re F.N.*, [2000] 1 S.C.R. 880, at para.14
[38] *Roper v. Simmons, supra* note 27at p.16
[39] Doob and Cesaroni, *supra*, note 30 at 40-45

> experiment in risky or illegal activities develop entrenched patterns of problem behaviour that persist into adulthood.[40]

Procedural Principle of Fundamental Justice

39. It is anticipated that the Respondent will fully address the criminal law principle that the Crown bears the burden of proving the circumstances which may result in an aggravated penalty, in this case an adult sentence for a young person. However, it is worth noting that this principle derives from the presumption of innocence, which international law dictates applies equally to youth.[41] Although the Quebec Court of Appeal noted that the *YCJA* provided discretion pursuant to which a youth court could interpret its provisions in a manner consistent with the international law, nonetheless international law informs the interpretation of the young person's s.7 rights. In other words, principles of fundamental justice require that the Crown must assume the burden of proving beyond a reasonable doubt the seriousness and circumstances in the commission of an offence when applied to a young person, consistent with the internationally accepted presumption that youth are not to be treated like adults.

Section 1

[40] Laurence Steinberg and Elizabeth S. Scott, *supra*, note 29 at p. 6
[41] *UNCRC*, art. 40; *The Beijing Rules, supra* note 16, Rule 7.1

40. International law is relevant to the s.1 analysis. As Lamer C.J. stated in *Slaight*,

> Given the dual function of s.1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial objectives which may justify restrictions upon those rights.[42]

41. The Appellant asserts that the objectives of the impugned provisions are to ensure accountability, protection of the public and public confidence in the administration of justice, and that such objectives are rationally connected to provisions that provide a presumption of publication and "access to a broader range of penalties." However, the Appellant has mischaracterized the presumption as merely allowing the court to consider more sentencing options. In fact, the provisions require the young person to be given only one type of sentence, an adult one (with diminished parole eligibility periods) unless the young person can demonstrate that they should receive a youth sentence. Further, it ignores the clear objectives of the youth criminal justice system, as articulated by the federal government, to prevent crime, ensure meaningful consequences for offending behaviour, and rehabilitate and reintegrate the young person. The goal of rehabilitation is consonant with and in fact requisite for the goal of public safety. As stated by the Supreme Court, society is best protected by preventing recurrence.[43]

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[42] *Slaight, supra* note 6 at pp. 1056-1057
[43] *Re F.N., supra* note 37 at para. 14

42. The Appellant offers no evidence to support the efficacy of adult sentencing which would support a presumption of its application to all young persons over 14 who have committed the prescribed offences. Serious concerns exist as to whether custodial dispositions further rehabilitation in any way. Doob has further noted that there is very little scientific evidence of the long term consequences of imposing adult sentences on young people. What little is known is based upon U.S. research which suggests that treating young people like adults has a negative impact on rehabilitation.[44]

43. The Appellant claims that since the onus applies exclusively to an extremely small minority of young persons, it therefore, minimally impairs the right in question. This is an untenable rationale. The Respondent is of the group of young persons so affected, and it is his right that is significantly impaired.

44. Given the significance of the Charter breach in question, the Appellant has failed to demonstrate that the presumption fails to minimally impair the right in question. The Respondent is not seeking a declaration that adult sentences are unavailable under any circumstances. The objectives of the legislation, as stated by the Appellant, can clearly be met by the shifting of the onus back to the Crown Attorney in accordance with well-accepted criminal law principals.

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[44] Doob and Cesaroni, *supra* note 30 at pp. 184-185

PART III
ORDER REQUESTED

45. The Foundation respectfully requests that the appeal be dismissed.

All of which is respectfully submitted this 16th day of September, 2005.

Cheryl Milne
Of counsel for the Intervener
Canadian Foundation for Children, Youth and the Law

SCHEDULE A
AUTHORITIES TO BE CITED
(in the order in which they appear)

1. *Reference re: Bill C-7 respecting the criminal justice system for young persons*, [2003] Q.J. No. 2850, (C.A.), 175 C.C.C. (3d) 321

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